2008

State of Utah v. Marvin Brown : Brief of Appellee

Utah Court of Appeals

Case No. 20080771-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Marvin Brown,
Defendant/Appellant.

Brief of Appellee

Appeal from conviction for retail theft with prior convictions, a third degree felony, in the Fourth Judicial District Court of Utah, Utah County, the Honorable Fred D. Howard presiding.

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STATEMENT OF JURISDICTION

Defendant appeals from his conviction for retail theft with prior convictions, a third degree felony. This Court has jurisdiction under UTAH CODE ANN. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUES

1. Was Defendant's prior conviction for a similar retail theft admissible under rule 404(b) to rebut his claim that he did not intend to steal the merchandise?

Standard of Review. A trial court's decision to admit evidence under rule 404(b), Utah Rules of Evidence, is reviewed for an abuse of discretion. *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 16, 6 P.3d 1120.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Rules of Evidence, Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Charge. Defendant was charged with one count of retail theft with prior convictions, a third degree felony, in violation of UTAH CODE ANN. §§ 76-6-602 and 76-6-412. R. 1.

Motions. Before trial, Defendant moved to bifurcate the evidence of the charged retail theft in this case from the evidence of his prior convictions. R. 38-37; R. 181:3. The State did not oppose that motion, but filed a notice of intent to introduce evidence of Defendant's two prior convictions for retail theft under rule 404(b), Utah Rules of Evidence. R. 63-74; R. 181:3. But the morning of trial, the prosecution asked to admit only one of the prior convictions, for the purpose of proving Defendant's intent to steal the merchandise in this case. R. 182:5-18. The

trial court granted the motion over Defendant's objection, but—at the prosecutor's suggestion—gave the jury a limiting instruction. R. 182:9-18, 105, 189, 283, 310.

Conviction. After a two-day trial, a jury convicted Defendant of retail theft. R. 182:333. Defendant then stipulated that he had two prior convictions of retail theft. R. 182:331. *See also* R. 182:338.

Sentence. The trial court suspended an indeterminate prison term of zero to five years in favor of a 150-day jail term, with credit for 92 days served, a suspended fine of $5,000, and 36 months' probation. R. 144-45.

Timely notice of appeal. Defendant timely appealed. R. 151.

STATEMENT OF FACTS

The Charged Retail Theft

Defendant and his father bought a chicken from the deli at Maceys grocery store. R. 182:239-40. After paying at the deli, Defendant's father gave the chicken and the receipt to Defendant, while he went to buy gravy. R. 182:240. Defendant took the box of chicken and the receipt and walked to Aisle 16, an aisle with a "lot of high theft items." R. 182:132. Although the chicken box had a grab handle on top, Defendant carried it in the palm of one hand. R. 182:134.

Maceys loss prevention officer Jerry McCann watched Defendant on security cameras from his office. R. 182:130, 132. McCann saw Defendant take a package of

batteries and "immediately slid[e] it underneath [] the box" of chicken. R. 182:133. McCann then watched as Defendant "paused for a little bit ... and then reached up again and grabbed two more and [] stuck the other two underneath there, so now he had three resting underneath the box of chicken." R. 182:135. McCann "zoomed in" so that he "could see the batteries underneath the chicken." R. 182:135. Defendant then "walked down the aisle a little bit slowly kind of looking around" and "started to walk straight through the checkstand and out of the store." R. 182:136. *See also* State's Exhibits 1 & 2 (security videotapes).

Katie Williams was waiting at her checkstand for her next customer. R. 182: 181. As Defendant walked through her checkstand, Williams asked "if he was ready" to checkout. Because Defendant simply "pointed to the receipt," she "assumed he [had] already paid for it." R. 182:182, 145. As Defendant continued through the checkstand, Williams could see only one item—a baked chicken in its container. R. 182:186.

McCann saw Defendant walk through the checkstand without paying for the batteries. R. 182:138-39. McCann explained that Williams's checkstand was a "direct shot to go straight out . . . of the store. It's aligned up pretty much with the front entrance. It's actually an area that a lot of people walk through to head right out of the store, especially shoplifters sometimes." R. 182:137.

McCann left his security office and approached Defendant as "[h]e was walking pretty quickly towards the exit of the store." R. 182:139. McCann stopped Defendant "a matter of maybe inches or a foot maybe away from the actual outside of . . . the store." R. 182:142; *see also* R. 182:150.

McCann identified himself and "asked [Defendant] if he had any Macey's merchandise in his possession that he failed to pay for." R. 182:139. Defendant paused briefly and then "pulled [] the batteries out from under ... the box." R. 182:143. Instead of answering McCann's question, Defendant merely offered, "I'm looking, I was looking for my father." R. 182:143.

McCann took Defendant upstairs. R. 182:143. When asked why he took the batteries, Defendant replied that he had not, but was merely looking for his father. R. 182:144. McCann then asked why Defendant "didn't [] leave the batteries in the store and go look for his father," or "tell the checker about the batteries when he walked through." R. 182:144. Defendant replied, "I don't know." R. 182:144.

The Prior Retail Theft

Seven months earlier, Defendant had committed another retail theft at Wal-Mart. R. 182:190. Defendant entered Wal-Mart with two previously-purchased items—guitar strings and a metronome. R. 182:191, 193. As he entered, Defendant received pink return stickers for each one; but instead of going to customer service

to complete the return, he took the items to the electronics department. R. 182:191, 193. There, he removed the sticker from one of the items and placed it on a "considerably more expensive" item from the store. R. 182:191, 194. Defendant then left the store with both the unpaid item and the other previously paid-for item. R. 181:191-92. Defendant was stopped by a Wal-Mart loss prevention officer upon leaving the store. R. 182:192.

Defendant waived his *Miranda* rights and immediately confessed the theft to a responding police officer. R. 182:191-93. He later pled guilty to a reduced charge. R. 182:195, 275-78.

The Defense

Defendant testified that he did not intend to steal the batteries. R. 182:256. When his father went to buy gravy, Defendant "figured [he]'d surprise [his father] and grab some batteries for his laser light." R. 182:249. After taking the batteries, Defendant claimed he "wandered the store looking for my dad basically, kind of lost in a daze. And then I seen him standing close to the door over by the, I thought he was buying smokes." R. 182:252.

Defendant claimed that as soon as he saw his father, "I turned and I walked [toward the checkstand] and I gestures, I says excuse me ma'am, my father is right there." R. 182:252. Defendant "could have sworn I said the word batteries, you

know, I'm taking these batteries to my father and pointed[] like that. And then she says yes whatever." R. 182:252. But, according to Defendant, when he got through the checkstand, his father was no longer there; so "I turned out, I took like two steps and I looked out, I could still see my truck sitting in the parking lot and I went to turn one more time and that's when Mr. McCann . . . was standing there." R182:252. Defendant claimed that as soon as McCann asked if he had something that he had not paid for, "I said yes, here, and I pulled out the, pulled the batteries out from under the box." R. 182:252-53.

Defendant testified that he had "made eye contact with [the cashier]," but conceded that he may have "just walked straight through [the checkstand]." R. 182: 253. "I thought I stopped for a second but I guess I just walked straight through and says there's my dad." R. 182:253. *See* State's Exhibits 1 & 2.

SUMMARY OF ARGUMENT

Defendant contends that it was an abuse of discretion, under rule 404(b), to admit evidence of his prior retail theft conviction. Rule 404(b) does not permit admission of other bad acts "to prove the character of a person in order to show action in conformity therewith." It does, however, allow evidence of other bad acts for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the prior retail theft was admitted for the proper noncharacter purpose of proving that Defendant intended to steal the batteries. From the beginning—as announced by defense counsel in her opening statement—Defendant always contended that he did not intend to steal the batteries; rather, he was looking for his father to see if he wanted to buy them. Evidence of Defendant's prior retail theft was relevant to rebut that claim, particularly where both thefts involved a similar deception. In both instances, Defendant used previously purchased items to give store employees the impression that he had already paid for the merchandise he was taking. The fact that Defendant had previously used a similar ruse to steal merchandise from Wal-Mart tended to negate his claim in this case that he did not intend to steal the batteries.

Moreover, the probative value of the prior retail theft was not outweighed by its danger for unfair prejudice. The two crimes were similar and evidence of retail theft is not the type of evidence designed to rouse the jury to overmastering hostility. Any unfair prejudice was also minimized when the trial court gave a limiting instruction on the evidence.

ARGUMENT

I.

DEFENDANT'S PRIOR CONVICTION FOR A SIMILAR RETAIL THEFT WAS ADMISSIBLE UNDER RULE 404(B) FOR THE PROPER NON-CHARACTER PURPOSE OF REBUTTING DEFENDANT'S CLAIM THAT HE DID NOT INTEND TO STEAL THE MERCHANDISE

Defendant argues that the trial court abused its discretion under rule 404(b), Utah Rules of Evidence, when it allowed the State to introduce evidence of his prior retail theft conviction.[1] Br. of Aplt. at 8-11. He asserts that the "prior conviction[] did not prove intent or absence of mistake/accident, and [its] prejudicial effect outweighed any probative value." *Id.* at 7. He reasons that any probative value was "minimal" because, "other than the type of crime committed," there are "no real similarities between [his] prior conviction for retail theft and the current charge." *Id.* at 10, 11. Thus, he asserts, the prior conviction led the jury to conclude that because Defendant "was once a thief," he must "be a thief now." *Id.* at 11.

The trial court did not abuse its discretion in admitting the prior conviction. The prior conviction was relevant to rebut Defendant's claim that when he concealed the batteries beneath the chicken and proceeded toward the exit, he did

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[1] Defendant's brief occasionally refers to the admission of the prior *convictions*. *See, e.g.*, Br. Aplt. 7-8. As explained, however, only evidence of one prior conviction was admitted.

not intend to steal the batteries; rather he was only looking for his father so that he could purchase them if his father wanted them. The strong probative value of this evidence was not substantially outweighed by its danger for unfair prejudice.

A. Evidence of other bad acts is admissible under rule 404(b) to prove non-character purposes, such as intent, so long as the evidence's probative value is not substantially outweighed by any danger for unfair prejudice.

Rule 404(b), Utah Rules of Evidence, states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of other bad acts is admissible under rule 404(b) if it meets a three-part test. *State v. Nelson-Waggoner*, 2000 UT 59, ¶¶ 18-20, 6 P.3d 1120 (*citing State v. Decorso*, 1999 UT 57, ¶¶ 21-26, 993 P.2d 837); *accord State v. Marchet*, 2009 UT App 205, ¶ 29, —P.3d—. First, the trial court must "determine whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b)." *Nelson-Waggoner*, 2000 UT 59, ¶18. *See also Marchet*, 2009 UT App 205, ¶ 29. The list of noncharacter purposes found in rule 404(b) is not exhaustive. *State v. Houskeeper*, 2002 UT 118, ¶ 28, 62 P.3d 444.

If the evidence is offered for a proper noncharacter purpose, the court must then determine whether the bad acts evidence is admissible under rule 402. *Nelson-Waggoner*, 2000 UT 59, ¶ 19. Under rule 402, "all relevant evidence is admissible except as otherwise provided in the rules." *State v. Widdison*, 2001 UT 60, ¶ 41, 28 P.3d 1278. *See also Marchet*, 2009 UT App 205, ¶ 29. Relevant evidence is evidence "'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Nelson-Waggoner*, 2000 UT 59, ¶ 19 (quoting Utah R. Evid. 401). Unless the evidence of the other bad act "tends to prove some fact that is material to the crime charged–other than the defendant's propensity to commit crime–it is irrelevant and should be excluded by the court pursuant to rule 402." *Id.* (citations omitted). *See also Marchet*, 2009 UT App 205, ¶ 41. In other words, the evidence must be relevant to the issues in the case at hand.

"Finally, the trial court must determine whether the other bad act evidence meets the requirements of rule 403 of the Utah Rules of Evidence." *Nelson-Waggoner*, 2000 UT 59, ¶ 20. *See also Marchet*, 2009 UT App 205, ¶ 29. Rule 403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence." Utah R. Evid. 403.

In sum, "evidence of prior misconduct is admissible under rule 404(b) if the evidence is relevant to a proper, non-character purpose, unless its danger for unfair prejudice and the like substantially outweighs its probative value." *State v. Widdison*, 2001 UT 60, ¶ 41. A trial court's decision to admit evidence under rule 404(b) is reviewed for an abuse of discretion.

B. Defendant's prior retail theft conviction was offered for a relevant, noncharacter purpose—to prove his intent.

The trial court did not abuse its discretion here because it admitted the prior retail theft conviction for a proper noncharacter purpose.

To convict, the State had to prove that Defendant knowingly possessed, concealed, or carried away, any merchandise in a retail establishment, "with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise." Utah Code Ann. § 76-6-602(1) (West 2004).

From the moment he was stopped by McCann, Defendant contested his intent to retain or permanently deprive Maceys of the batteries without paying for them. When McCann asked Defendant if he had any unpaid merchandise, Defendant

pulled out the batteries and claimed to only be looking for his father. R. 182:143. When McCann took Defendant upstairs and asked him why he had taken the batteries, Defendant disclaimed trying to steal them and reiterated that he was merely looking for his father. R. 182:144. In other words, Defendant claimed that he did not intend to steal the batteries at all and that when he headed toward the exit he was not planning to leave; rather, he was only looking for his father to see if he wanted to buy the batteries. Defendant's story thus suggested that both McCann and the cashier were mistaken as to his intent.

In her opening statement, defense counsel told the jury that there was only one contested issue: "what was going on in [Defendant's] mind and what his intent was when he took the actions that he did." R. 182:124. Defense counsel promised that Defendant would testify "that he had no intention of stealing those batteries." R. 182: 124. It was to rebut that defense and to prove intent that the prosecution asked to admit evidence of the prior theft conviction. R. 182:6-9.

The trial court properly recognized that the prior conviction was relevant for the proper, noncharacter purpose proffered by the State. The testimony of McCann and the cashier showed that Defendant used the receipt from the purchase of the chicken to get him safely through the checkout area without raising the suspicion of the cashier. The prior retail theft involved a similar deception. Defendant entered a

Wal-Mart store with two previously-purchased items. R. 182:193. He received pink stickers for both, which indicated that the items were being returned. R. 182:191. But instead of going to customer service, Defendant went to the electronics department, where he removed the return sticker from one purchased item and placed it on a "considerably more expensive" item. R. 182:191, 194. Defendant then took his purchased item and the stolen item, both with pink return stickers, and headed out of the store before being apprehended. R. 182:191-92.

In both instances, Defendant used previously-purchased items to give store employees the impression that he had already paid for the items he was taking. *See* R. 182:136, 191-92.

The fact that Defendant had previously tried to shoplift using a similar technique tended to rebut his claim in this case that he lacked the required intent. Absent evidence of the prior theft, Defendant's claim that he did not intend to steal the batteries, but was only looking for his father, was plausible. This is particularly true where Defendant was stopped before he actually left the store. R. 182:142, 150. But the plausibility of that claim evaporates when one knows that Defendant had been convicted of stealing from another store using a similar technique. The prior conviction suggested, at a minimum, that once a person had been convicted under

those circumstances, he would be on notice that similar conduct could be taken as a sign of guilt—certainly, it would rebut a claim of innocence.

Defendant nevertheless contends that the prior crime was irrelevant because "[t]here are no real similarities between [Defendant]'s prior conviction for retail theft and the current charge, other than the type of crime committed." Br. of Aplt. at 10. As explained, the prior conviction was very similar to Defendant's conduct in this case. Both instances involved Defendant using a previously-purchased item to conceal an unpaid item as he left the store. But whether a prior bad act is similar is not the test for determining whether it is relevant to a noncharacter purpose. Rather, the question for relevance is whether it has some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401. While similar crimes do tend to be relevant, dissimilar crimes may also be relevant in a particular case. *See, e.g., State v. Allen*, 2005 UT 11, ¶¶ 12-34, 108 P.3d 730 (in murder-for-hire prosecution, evidence that defendant made fraudulent credit card purchases before and after murder relevant to show how defendant concealed payments to killers); *State v. Pearson*, 943 P.2d 1347, 1351-52 (Utah 1997) (in aggravated murder prosecution for killing police officer during a high speed chase, evidence that defendant had committed drug offense in another state relevant to

motive and intent in shooting the officer); *State v. Bates*, 784 P.2d 1126, 1127-28 (Utah 1989) (in child rape prosecution, evidence that the victim had seen defendant strike her mother relevant to explain why victim delayed reporting the rape).

As explained, the prior conviction here was relevant because it had a tendency to disprove Defendant's defense of lack of intent. It did not have to be identical to the instant crime to do so.

In sum, evidence of Defendant's prior conviction for a similar incident of retail theft was relevant to the noncharacter purpose of proving intent, the only disputed issue in this case. The evidence therefore passes the first two steps of rule 404(b).

C. The probative value of a prior similar retail theft was not substantially outweighed by any potential for unfair prejudice.

The evidence also passes the third step under rule 403. Rule 403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" Utah R. Evid. 403. Defendant argues that the prior conviction was highly prejudicial and substantially outweighed any probative value. Br. of Aplt. at 9.

But, "prejudice alone is not sufficient justification to exclude" evidence under rule 403. *Woods v. Zeluff*, 2007 UT App 84, ¶ 7, 158 P.3d 552. "Rather, the balancing test under rule 403 requires measuring the danger of *unfair* prejudice." *Id.* (emphasis added). This is because "[a]ll effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered." *Id.* (internal quotation marks and citations omitted).

Thus, "prejudice which calls for exclusion [under rule 403] is given a more specialized meaning: an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror." *Id.* (internal quotation marks and citations omitted). Stated differently, "[e]vidence is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause the jury to base its decision on something other than the established propositions in this case." *State v. Teuscher*, 883 P.2d 922, 928 (Utah App. 1994) (quoting *State v. Bartley*, 784 P.2d 1231, 1237 (Utah App. 1989)) (internal quotation marks and citations omitted). *See also State v. Reed*, 2000 UT 68, ¶ 29, 8 P.3d 1025 (one factor to be considered under rule 403 is whether evidence "will rouse the jury to overmastering hostility").

Some factors that may be considered in balancing whether the probative value of prior bad acts is substantially outweighed by their potential for unfair prejudice include: (1) the strength of the evidence that the defendant committed the other bad acts; (2) any similarities between the crimes; (3) the time interval between the two crimes; (4) the need for the bad acts evidence; (5) the efficacy of alternative proof, if any; and (6) the degree to which the evidence is likely to "rouse the jury to overmastering hostility." *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988). *See also Marchet*, 2009 UT App 205, ¶ 44.

In light of the so-called *Shickles* factors, any potential for unfair prejudice did not substantially outweigh the probative value of the prior retail theft conviction. First, evidence of the prior theft was strong. Defendant pled guilty to the theft and admitted in his testimony that he had committed it. Indeed, he used the prior theft to argue to the jury that he was more than willing to admit and take responsibility for crimes that he had committed. He testified that he had candidly and readily confessed to the prior theft because he had committed it; he was unwilling to do so in this case, however, because he was innocent. R. 182:270.

Second, as explained, the two thefts, although not identical, were similar. Both involved using previously-purchased merchandise to hide a theft.

Third, only seven months separated the two thefts. *See State v. Decorso*, 1999

UT 57, ¶ 32, 993 P.2d 837 (seven-month period between alleged crimes "relatively short"); *State v. O'Neil*, 848 P.2d 694, 701 (Utah App. 1993) (three-year gap between prior crime and charged crime "a short period of time"); *Marchet*, 2009 UT App 205, ¶ 45 (one- and two-year intervals between other rapes "sufficiently proximate to warrant [their] admission").

Fourth, the prior theft was necessary to rebut Defendant's claim that his purpose in walking toward the exit with the hidden batteries was purely innocent. Without the prior theft conviction, the jury would be left to resolve what Defendant was thinking based solely on his testimony and prior statements.

Fifth, the only alternative proof to Defendant's intent was his prior statements to McCann and the circumstantial evidence of his hiding the batteries and walking toward the exit. While that evidence may have been sufficient to find Defendant guilty, his claim of innocence—without the prior theft evidence—might have sowed a reasonable doubt in the jury's mind.

Finally, Defendant's prior conviction for retail theft was not the kind of evidence that would "rouse the jury to overmastering hostility." *State v. Reed*, 2000 UT 68, ¶ 29, 8 P.3d 1025. This is particularly true where the trial court gave the jury a limiting instruction on how it could use the evidence. *See State v. Kirkwood*, 2002 UT App 128, ¶14, 47 P.3d 111 (*citing State v. Smith*, 700 P.2d 1106, 1110 (Utah 1985)

(holding that trial court should issue a limiting instruction cautioning the jury to use past crimes evidence admitted under rule 404(b) only for the purpose for which it was admitted)). Before testimony regarding the prior conviction was allowed, the trial court instructed the jury:

> You are instructed that any and all evidence relating to the defendant's prior commission and conviction for retail theft in 2006 is only admitted for the purposes of attempting to prove the defendant's knowledge, intent, preparation, common plan or scheme, or absence of mistake of accident as to the present retail theft charge facing the defendant. Specifically evidence of the prior conviction cannot be considered as proof of character or a propensity to commit theft.

R. 182:189.[2] The trial court reiterated this limiting instruction before deliberations began. R. 182:283. And during closing arguments, both defense counsel and the prosecutor restated the importance of the limiting instruction. R. 182:310, 299. The prosecutor reminded the jury of the limiting instruction in its rebuttal closing: "The idea that because you've committed a theft previously that you've then committed this theft or that that's evidence that yes, well, you were a thief then so you're probably [a] thief now. That is entirely inappropriate." R. 182:319.

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[2] Jury Instruction 15 is not paginated in the record. It appears immediately following "FINAL JURY INSTRUCTIONS 15-29 AND A-B", R. 138, and before INSTRUCTION NO. 16, R. 137.

In sum, while the challenged evidence had substantial probative value, its risk of unfairly prejudicing the jury was minimal. Thus, the trial court did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. The evidence, therefore, was properly admitted.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted August 13th, 2009.

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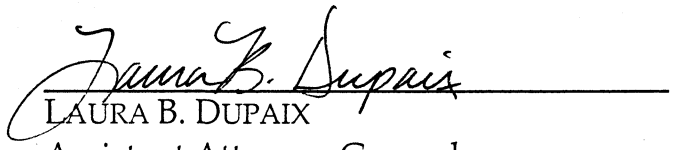

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I certify that on August 13th, 2009, two copies of the foregoing brief were

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A digital copy of the brief was also included: ☑ Yes ☐ No

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